

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FREDDIE PICKENS)	
Claimant)	
)	
VS.)	
)	
CONTINENTAL PLASTIC CONTAINERS)	
Respondent)	Docket No. 242,320
)	
AND)	
)	
CNA INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the May 11, 2005 Review & Modification of an Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on October 25, 2005. The Division of Workers Compensation's Director appointed Jeffrey K. Cooper of Topeka, Kansas, to serve as Board Member Pro Tem in place of Julie A.N. Sample, who recused herself from this proceeding.

APPEARANCES

Chris Miller of Lawrence, Kansas, appeared for the claimant. Clifford K. Stubbs of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This work-related low back injury claim was originally resolved by an August 16, 2000 Agreed Award. The Agreed Award memorialized a compromise settlement and claimant was compensated for an approximate 10 percent permanent partial disability subject to the right to review and modification and future medical treatment. Claimant continued to work for respondent but on February 5, 2001, he took a gun to work intending

to threaten his supervisors to stop perceived harassment. Following that incident, claimant was suspended and ultimately terminated from his job.

The claimant filed an application for post award medical seeking psychiatric treatment and temporary total disability compensation. The respondent denied claimant's psychological problems were causally related to his back injury. It was undisputed claimant had a preexisting psychological condition but the Administrative Law Judge (ALJ) determined that claimant's preexisting psychological condition had been aggravated, accelerated or intensified by his work-related accident and ordered respondent to provide claimant psychiatric treatment. On review the Board on April 30, 2003, affirmed the ALJ's determination that claimant's psychiatric condition was related to his January 1999 accident and further determined claimant was entitled to temporary total disability compensation as he was unable to work.

Claimant then filed an application for review and modification of the April 30, 2003 Board Order alleging that he is now permanently and totally disabled. The respondent again denied that claimant's psychological condition was related to claimant's work-related accident. The ALJ noted the Board found the claimant's psychiatric condition was causally related to his work-related accident and determined the Board's decision would not be changed. The ALJ further found the claimant is permanently and totally disabled.

The respondent requests review and again argues the claimant's psychological condition was neither caused nor aggravated, intensified or accelerated by the work-related low back injury. Respondent further argues the claimant has not sustained his burden of proof that his psychological condition is directly traceable to his work-related accident or that his back condition has changed.

Claimant argues that the only issue for Board review is whether claimant is now permanently and totally disabled. Claimant further argues that respondent's request to re-litigate whether claimant's psychiatric condition is causally related to the work-related low back injury should be denied because that issue was determined in the previous post-award medical proceeding. Consequently, the claimant requests the Board to affirm the ALJ's Review and Modification of an Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Respondent's argument that claimant's psychological condition is not a result of the original injury was litigated at the time of the post award medical proceeding both before the ALJ as well as before the Board on review. On review the Board affirmed the ALJ's determination that claimant's preexisting psychological condition had been aggravated,

accelerated and intensified by his work-related injury and, as such, was directly traceable to the work-related low back injury.

Larson's Workers' Compensation Law, Chapter 127, § 127.07[2] (2005), states:

As to *res judicata* in compensation-related matters, the beginning point is recognition of the proposition that *res judicata* does apply to the decisions of compensation Boards and Commissions no less than to the decisions of a court.

In addition, the Kansas Supreme Court held in *Neunzig*¹, that the doctrine of *res judicata* applies to administrative proceedings when the agency acts in a judicial capacity.

In order for *res judicata* to apply to litigation, there must be “(1) judgment on merits in earlier action, (2) identity of parties or privies in two suits, and (3) identity of cause of action in both suits.”² *Res judicata* prevents a party from relitigating issues which have been decided adversely to that party.³

Claimant argues that respondent seeks to reexamine a finding of a past fact which is prohibited generally. Once a finding has been made that a condition is or is not a natural consequence of an injury arising out of and in the course of employment and that finding becomes final for want of an appeal from the final decision, the doctrine of *res judicata* applies. A party is foreclosed from seeking a review and modification under K.S.A. 44-528 on the issue of causation. Such finding on the issue of causation is a finding of a past fact which existed at the time of the original hearing and will not be relitigated.⁴ On review and modification, issues previously determined in the first award may not be re-litigated with the exception of the changes, if any, in the claimant's present disability.⁵

The Board's previous determination in the post award medical proceeding that claimant's psychological condition was directly traceable to his work-related injury related to the specifically diagnosed psychological condition of depression. At that time Dr. G. R. Wurster diagnosed claimant with major depression and personality disorder with paranoid traits. The treating physician also diagnosed claimant with major depression and anxiety disorder. Accordingly, the primary diagnosis was depression and psychiatric treatment was ordered after it was determined that claimant's accident resulted in that condition.

¹ *Neunzig v. Seaman U.S.D. No. 345*, 239 Kan. 654, 722 P.2d 569 (1986).

² *Urban v. King*, 995 F.Supp. 1251 (D.Kan. 1998).

³ *Hoelting Enterprises v. Nelson*, 23 Kan. App. 2d 228, 929 P.2d 183 (1996).

⁴ *Randall v. Pepsi-Cola Bottling, Co., Inc.*, 212 Kan. 392, 510 P.2d 1190 (1973).

⁵ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997), *Brandt v. Kansas Workers Compensation Fund*, 19 Kan. App. 2d 1098, 880 P.2d 796 *rev. denied* 256 Kan. 994 (1994).

The claimant filed the instant proceeding for review and modification seeking a determination that as a result of his psychological condition he is now permanently and totally disabled. The primary psychological condition at this point is paranoia disorder. Thus, the issue at this point is whether claimant's paranoia disorder was caused by his work-related accident. And if so, is claimant permanently and totally disabled as a result of that condition. Accordingly, this proceeding is not a relitigation of the Board's finding in the first review and modification proceeding.

After the initial post award medical proceeding the claimant received continuing treatment from Dr. Wurster, a psychiatrist. Dr. Wurster initially treated claimant for depression with paranoia and noted that with treatment and medications the claimant's depression resolved. The doctor noted that claimant now suffers from paranoia without depression. And the doctor noted that claimant's paranoia was aggravated, accelerated, and intensified by his work-related injuries. Dr. Wurster testified:

Q. [By Mr. Miller] Doctor, I have a couple of additional questions if I could. I believe you indicated in your prior testimony with respect to this case that it was your opinion that Mr. Pickens' paranoia was aggravated, accelerated, or intensified as a result of his Workers' Compensation injuries and the handling of those injuries by his former employer. Does that continue to be your opinion?

MR. STUBBS: Objection. Misstates the doctor's prior testimony.

A. Yes.⁶

In the initial review and modification proceeding both the claimant's treating physician, Dr. John H. Henderson Jr. and Dr. Wurster diagnosed claimant not only with depression but also anxiety disorder as well as personality disorder with paranoia. Although the initial treatment focus was the claimant's depression the other problems had been diagnosed. And at the initial review and modification proceeding the respondent's expert also diagnosed claimant with a paranoid personality disorder although that doctor concluded it was not caused by claimant's work-related accident. Dr. Michael J. Pronko, respondent's expert, testified in this proceeding that claimant's paranoid personality disorder was neither caused nor aggravated by his work-related back injury.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁷ The Board is persuaded that in this instance the opinion of the treating

⁶ Wurster Depo. at 22-23.

⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

psychiatrist, Dr. Wurster, is more persuasive, and finds that claimant's paranoid personality disorder was aggravated, accelerated and intensified as a result of his work-related accident.

Dr. Wurster opined that claimant is not employable as a result of his psychological problems. Respondent arranged for claimant to be examined by Dr. Pronko, a board certified psychiatrist. Dr. Pronko also opined that claimant is not presently employable. Both doctors further concluded claimant needs continuing psychiatric care and treatment.

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.⁸ An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."⁹

Both Drs. Wurster and Pronko agreed claimant requires continuing psychological treatment and that he is unemployable as a result of his psychological condition. The Board affirms the ALJ's finding claimant is incapable of substantial and gainful employment and entitled to an award of permanent total disability.

AWARD

WHEREFORE, it is the decision of the Board that the Review & Modification of an Award of Administrative Law Judge Kenneth J. Hursh dated May 11, 2005, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of November 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁸ K.S.A. 44-510c(a)(2).

⁹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

c: Chris Miller, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director